Supreme Court, U.S.
FILED
JAN 6 1999
OFFICE OF THE CLERK

No. 98-956

In the Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES J. CANNON AND
WILLIAM L. BLAGG, PETITIONERS

v.

LAWRENCE G. WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
GILBERT S. ROTHENBERG
THOMAS J. CLARK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an attorney who is publicly rebuked in findings entered in a sanctions proceeding may appeal the order containing those findings in the absence of a monetary or other formal coercive sanction.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Discussion	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	4, 6
Bolte v. *Home Ins. Co.*, 744 F.2d 572 (7th Cir. 1984)	10, 11
Bushkin Assocs., Inc., In re, 864 F.2d 241 (2d Cir. 1989)	12-13
Chambers Dev. Co., In re, 148 F.3d 214 (3d Cir. 1998)	12, 13
Clark Equip. Co. v. *Lift Parts Mfg. Co.*, 972 F.2d 817 (7th Cir. 1992)	10
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992)	4
Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990)	6
FDIC v. *Tekfen Constr. & Installation Co.*, 847 F.2d 440 (7th Cir. 1988)	6
Fromson v. *Citiplate, Inc.*, 886 F.2d 1300 (Fed. Cir. 1989)	9
Martin v. *Brown*, 63 F.3d 1252 (3d Cir. 1995)	7
Penthouse Int'l, Ltd. v. *Playboy Enters., Inc.*, 663 F.2d 371 (2d Cir. 1981)	9
Sandahl, In re, 980 F.2d 1118 (7th Cir. 1992)	12
Sullivan v. *Committee on Admissions & Grievances*, 395 F.2d 954 (D.C. Cir. 1967)	7, 8
Ted Lapidus, S.A. v. *Vann*, 112 F.2d 91 (9th Cir.), cert. denied, 118 S. Ct. 337 (1997)	5

Cases—Continued: Page

United States v. *Isgro*, 974 F.2d 1091 (9th Cir. 1992), cert. denied, 507 U.S. 985 (1993) 6-7
United States v. *Mendoza*, 464 U.S. 154 (1984) 1
Walker v. *City of Mesquite*, 129 F.3d 831 (5th Cir. 1997) 5, 7, 8, 9

Statutes and rule:

28 U.S.C. 158(a)(3) 3
28 U.S.C. 158(d) 4
28 U.S.C. 1291 ..... 4, 12
Fed. R. Civ. P.:
Rule 37(a) 3
Rule 37(b) 3

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-956

CHARLES J. CANNON AND
WILLIAM L. BLAGG, PETITIONERS

v.

LAWRENCE G. WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case addresses a question of importance on which the courts of appeals are divided. Whether an attorney who is publicly rebuked in findings entered in a sanctions proceeding may appeal the order containing those findings in the absence of a monetary or other formal coercive sanction is a question of recurring importance to the United States. As this Court has noted, "the Government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity." *United States* v. *Mendoza*, 464 U.S. 154, 159 (1984). The government's lawyers appear in court more frequently than attorneys for

any other litigant. Because it is not unusual for disgruntled litigants to vent their frustrations at government counsel, the United States has a strong interest in ensuring that the professional reputations of its attorneys—such as the petitioners in this case—are not harmed by unreviewable and unremediable public rebukes set forth in formal findings entered in sanctions proceedings.

STATEMENT

1. Petitioners Cannon and Blagg are federal employees who, as attorneys, represent the United States in tax litigation (Pet. App. 93a). In a published order entered on April 14, 1995, the bankruptcy court imposed fines of $750 on each of the petitioners in connection with their representation of the United States in a tax dispute in that court (*id.* at 88a, 98a). Although the order was entered in response to a sanctions motion filed by the debtor, the court ordered the fines to be paid to the clerk of the court (*id.* at 98a). The court further decreed that petitioners were not to seek reimbursement for the fines from the United States (*ibid.*).

In findings entered in the published order that imposed the fines, the bankruptcy court concluded that Blagg had an "attitude problem," that some of his testimony was "pure baloney," that he had done "his best * * * to obstruct the Plaintiff's discovery," and that his conduct was "intentional, unprofessional, and unjustified" (Pet. App. 94a, 95a). The court similarly found that Cannon had shown a "disdain for the Federal and Bankruptcy Rules of Procedure, his adversaries, and Courts alike," and that his conduct in this case "places his performance and credibility at about the same level as that of his colleague, William Blagg" (*id.*

at 97a). The court stated that the "egregious conduct of the Defendant's agents" constituted "government lawyer misbehavior" and concluded that their "actions were specifically calculated to impede Plaintiff's attempts to obtain discovery material to which it was clearly entitled" (*id.* at 96a-97a & n.9). The court stated that the personal fines that it imposed on petitioners were necessary "to discourage these and other government agents from engaging in 'big brother' abuses of private sector litigants" (*id.* at 97a-98a).

In a second published opinion dated October 24, 1995, the bankruptcy court vacated the $750 fine imposed on Blagg. Since Blagg was not a counsel of record in the case, the court acknowledged that it lacked personal jurisdiction to assess a fine against him (Pet. App. 69a, 78a). In vacating the fine, however, the court stated that its "findings and conclusions regarding Mr. Blagg's conduct and demeanor remain intact" (*id.* at 78a).

At the same time, the court altered its order with respect to Cannon. The court concluded that, under Rule 37(b) of the Federal Rules of Civil Procedure, the $750 fine that it had entered against Cannon in response to the debtor's motion for sanctions should be paid to the debtor rather than to the Clerk of the Court. The court reiterated its prior directive that Cannon was not to seek reimbursement for this fine from the government (Pet. App. 86a).

2. The district court accepted jurisdiction over petitioners' appeal under 28 U.S.C. 158(a)(3) and vacated the $750 sanction against Cannon (Pet. App. 40a, 68a). The court noted that a discovery sanction may not be imposed under Rule 37(b) unless a discovery order issued pursuant to Rule 37(a) has been violated by the party to be sanctioned. Because no pertinent discovery order issued under Rule 37(a) had been violated in this

case, the sanctions imposed by the bankruptcy court were invalid (Pet. App. 63a-64a).

The district court declined, however, to vacate the findings and the public reprimand of petitioners in the bankruptcy court orders. The district court justified the reprimand as an exercise of the bankruptcy court's "inherent * * * ability" to "discipline the attorneys appearing before it" (Pet. App. 65a). According to the district court, "[f]undamentally, what the bankruptcy court heard was substantial evidence that Cannon and Blagg, among others, made promises that they did not keep" (*ibid.*). The district court concluded that "[w]hether conduct is in violation of a standing discovery order or in breach of an informal agreement, the evidence before the bankruptcy court fully supports the finding that appellants' conduct was 'intentional, unprofessional, and unjustified'" and "justif[ied] the bankruptcy court's finding of bad faith" (*id.* at 67a). In thus "sustain[ing]" the findings of the bankruptcy court, the district court concluded that "[p]ublishing specific findings of bad faith is but one remedy the bankruptcy court had available." Pet. App. 65a-66a (citing *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988)).

3. A divided panel of the First Circuit declined to reach the merits of petitioners' appeals (Pet. App. 2a-16a).[1] Because the monetary sanctions against both Blagg and Cannon had been vacated, the court held that there was no appealable final order left for review (*id.* at 8a). The court concluded that unless the lower court "expressly identified" its findings of bad conduct

---

[1] The courts of appeals have appellate jurisdiction over district court decisions in bankruptcy cases under 28 U.S.C. 158(d) and 28 U.S.C. 1291. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 251-254 (1992).

by an attorney "as a reprimand" (*id.* at 13a), the court of appeals would have no jurisdiction to review the underlying findings.[2] In thus declining to accept jurisdiction, the court noted that the Fifth Circuit has concluded that an attorney may appeal findings of misconduct entered in a disciplinary proceeding even if a formal sanction was not entered in such a proceeding (*id.* at 14a n.6 (citing *Walker* v. *City of Mesquite*, 129 F.3d 831 (1997))). The court, however, "respectfully decline[d] to follow" the Fifth Circuit rule (*ibid.*).

Petitioners filed a timely petition for rehearing with a suggestion for rehearing en banc, which the court denied (Pet. App. 35a-38a). Three of the six active judges dissented from the denial of en banc review. The dissenting judges noted that "[a] published reprimand is a punishment that is in many cases far more serious than the imposition of monetary sanctions" (*id.* at 36a) and that, if an appeal were not permitted in this context, the aggrieved lawyer may "end up with a blot on his or her record that will never be erased" (*id.* at 37a). The dissenting judges concluded that it is "especially inappropriate" to make appealability turn on the empty formalism of whether the trial judge has "expressly identified" its formal public rebuke of an attorney as a "reprimand" (*ibid.*). They further noted that mandamus relief is available only in "exceedingly narrow" circumstances and therefore cannot function as

---

[2] On the merits, petitioners sought to dispute the basic findings of the bankruptcy court and to contend that they had been denied due process in the issuance of sanctions without sufficient particularized notice of the conduct alleged to be sanctionable or the standard by which their conduct would be judged. See, *e.g.*, *Ted Lapidus, S.A.* v. *Vann*, 112 F.3d 91, 96 (2d Cir.), cert. denied, 118 S. Ct. 337 (1997).

a suitable "check on judges who may be too free to issue unwarranted reprimands" (*id.* at 38a).

DISCUSSION

In holding that an attorney may not obtain appellate review of a public censure issued by a federal trial court unless the court accompanied that censure with a coercive sanction or "expressly identified" the censure "as a reprimand" (Pet. App. 13a), the decision in this case directly conflicts with decisions of other circuits on an issue of substantial recurring importance. Review by this Court is therefore warranted.

1. The "most precious asset" of attorneys "is their professional reputation." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part and dissenting in part). By issuing formal findings that discredit a lawyer's reputation, a federal judge may inflict harm on an attorney that is far greater than the merely transient injury that results from monetary sanctions. As the three dissenting members of the court of appeals stated in this case, "[b]eing branded unethical or incompetent by a federal judge can essentially destroy a lawyer's career" (Pet. App. 36a).[3]

This Court concluded in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988), that such a public "branding" of an attorney in a published reprimand is a permissible sanction for violation of a rule of practice. Courts have consistently recognized that such published findings that reprimand or chastise a lawyer constitute a "serious sanction" (*United States* v. *Isgro*,

---

[3] "A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter." *FDIC* v. *Tekfen Constr. & Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988).

974 F.2d 1091, 1099 (9th Cir. 1992), cert. denied, 507 U.S. 985 (1993)) that is more injurious than any modest monetary fine. See *Martin* v. *Brown*, 63 F.3d 1252, 1260 (3d Cir. 1995) ("the dollar amounts of the sanctions imposed * * * are insignificant in comparison to their stigmatic effect"); *Walker* v. *City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997) (rejecting "out of hand" the idea that "an attorney has more of a reason and interest in appealing the imposition of a $100 fine than appealing a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct"); Pet. App. 36a ("Reputational damage alone may be worse for a lawyer than any monetary sanction."). The courts of appeals are in disagreement, however, as to whether an attorney may appeal a decision that contains formal findings of censure unless the lower court has, in addition, imposed some monetary or other coercive sanction against the attorney.

Most of the courts of appeals that have addressed the issue have held that a lawyer may appeal a lower court's public declaration that the lawyer has engaged in professional misconduct. For example, in *Sullivan* v. *Committee on Admissions & Grievances*, 395 F.2d 954 (D.C. Cir. 1967), the court of appeals allowed an appeal from a decision of the district court that had found that an attorney had violated several ethical rules but which, because the ethical issue was one of first impression, had not imposed any formal sanctions against the attorney. *Id.* at 956. In an opinion by then-Judge Burger, the attorney was permitted to appeal from that portion of the district court's opinion "reflect

ing unfavorably on his professional conduct." *Ibid.* As the court of appeals explained (*ibid.*):

> [T]he District Court has determined that Appellant was guilty of proscribed conduct and this determination plainly reflects adversely on his professional reputation. In a sense Appellant's posture is not unlike that of an accused who is found guilty but with penalties suspended. We conclude this gives him standing to appeal.

Other courts of appeals have similarly permitted lawyers to appeal from a public judicial censure of their professional conduct even in the absence of a monetary or other coercive sanction. In *Walker* v. *City of Mesquite*, 129 F.3d at 832, a government attorney was permitted to appeal when he had been "reprimanded sternly and found guilty of blatant misconduct." The court stated that such a public reprimand of the attorney (*id.* at 832-833)

> must be seen as a blot on [his] professional record with a potential to limit his advancement in governmental service and impair his entering into otherwise inviting private practice. We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.

Nothing in the *Walker* opinion suggests that the findings of misconduct in the trial court's opinion had been formally or "expressly identified as a reprimand" (Pet.

App. 13a).[4] Instead, the Fifth Circuit reasoned that the trial "court order finding professional misconduct" by itself constituted a sufficient public reprimand to permit appellate review even in the absence of "a finding of monetary liability or other punishment" (129 F.3d at 832-833).

Similarly, in *Fromson* v. *Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed. Cir. 1989), the court of appeals allowed an attorney to appeal even though the only "sanction" that had been entered was the trial court's finding of professional misconduct.[5] The court specifically noted in allowing the appeal that there was "no judgment imposing any monetary or other sanction on him." *Ibid.*

The Seventh Circuit, to the contrary, has held that a public judicial reprimand of an attorney in a written

---

[4] In *Walker*, the trial court had entered an order making findings of serious professional misconduct by three Department of Justice lawyers and inviting those attorneys to respond before a final order concerning sanctions to be imposed. After further submissions, the trial court announced at a hearing that it was deleting the findings against two of the three lawyers, but the court refused to vacate the prior opinion or otherwise exonerate one of the lawyers. The court then entered a final order in which it reaffirmed the findings of misconduct against that lawyer but stated that no further action would be taken. The Fifth Circuit treated the trial court's written findings, by themselves, as constituting the court's "reprimand." See 129 F.3d at 832.

[5] In the *Fromson* case, the Federal Circuit relied on *Penthouse International, Ltd.* v. *Playboy Enterprises, Inc.*, 663 F.2d 371, 373 (1981), in which the Second Circuit allowed an attorney (along with his client) to appeal a formal sanction of dismissal that had been entered by the district court for discovery abuse and misrepresentation of material facts. The court in *Penthouse* upheld the formal sanction of dismissal and remanded the case for "further consideration" of "whether reasonable costs and expenses should be awarded" to the defendant. *Ibid.*

decision does *not* provide a basis for appellate review unless a monetary or other coercive sanction has been imposed. In *Bolte* v. *Home Insurance Co.*, 744 F.2d 572 (1984), the Seventh Circuit stated that, if such appeals were allowed, "a breathtaking expansion in appellate jurisdiction would be presaged." *Id.* at 573. The court concluded that, "especially in an age of congested appellate dockets, * * * we do not think they are within the scope of section 1291." *Ibid.* The court applied that same reasoning in holding that it lacked jurisdiction to consider a similar appeal in *Clark Equipment Co.* v. *Lift Parts Manufacturing Co.*, 972 F.2d 817 (7th Cir. 1992).

In the present case, the court of appeals chose a course that falls between the conflicting rules of the Seventh Circuit in *Bolte* and of the Fifth and Federal Circuits in *Walker* and *Fromson*. Recognizing that "[s]anctions are not limited to monetary imposts," the First Circuit concluded in the present case that "[w]ords alone may suffice if they are expressly identified as a reprimand" (Pet. App. 13a). The court held, however, that an attorney may not appeal formal findings of misconduct entered by the trial court if that court does *not* label its public censure "as a reprimand" (*ibid.*). This intermediate rule adopted by the First Circuit in this case has been adopted by no other court. It thus further splinters the circuits on this recurring issue.

In adopting its unique rule, the court of appeals expressed a concern that, if attorneys were permitted to appeal from anything less than a formal censure that the trial court had expressly labeled as a "reprimand," the result "would be tantamount to declaring open season on trial judges" (Pet. App. 12a). But lawyers in the District of Columbia, Federal, and Fifth Circuits

have been permitted to appeal from a trial court's public findings of professional misconduct, and there has been no "open season on trial judges" in those circuits. Moreover, contrary to the fears expressed by the Seventh Circuit in *Bolte*, 744 F.2d at 573, there has also been no "breathtaking expansion" of litigation concerning the public censure of lawyers in these circuits. As the dissenting judges in this case explained in refuting a similar concern expressed by the majority below (Pet. App. 38a):

> Any lawyer appealing a reprimand takes the risk that [the court of appeals], reaching the merits, will agree that the sanction is justified—thus giving the sanction far more force than it would have had if it had come from a trial judge unendorsed by a reviewing court. Accordingly, the lawyer's self-interest dictates that an appeal be taken only in cases in which the sanction is particularly damaging to the lawyer's reputation and particularly undeserved.

When a court publicly rebukes a lawyer, the censure inflicts a lasting harm to the lawyer's professional standing and reputation. That harm is palpable whether or not the public rebuke is formally labeled, or "expressly identified," as a "reprimand" by the lower court. The line that the court sought to draw between appealable and non-appealable orders is not related either to whether fundamental harm was inflicted on the attorney or to the question whether a "final decision" was entered by the lower court. When, as in the present case, the order was entered as the court's final decision in a sanctions proceeding that is collateral to the main action, the attorney injured by that order should be permitted to appeal. Whether that final

decision contains a sanction that the lower court formally labeled and "expressly identified as a reprimand" (Pet. App. 13a) or, instead, contains formal findings of professional misconduct that (however labeled) represent a "sanction" for professional misconduct, the injury in fact suffered by the attorney from that final decision on this collateral matter supports appellate jurisdiction.[6]

We do not advocate a rule that expands the jurisdiction of the courts of appeals by ignoring the requirement of a "final decision[]" under 28 U.S.C. 1291. Instead, it is our view that this fundamental requirement of appellate jurisdiction is satisfied when (as in the present case) a published reprimand that functionally operates as a sanction is issued as a final decision in a sanctions proceeding.

2. The recurring question presented in this case has created confusion among the lower courts and has resulted in no fewer than three different rules in the courts of appeals. Both the majority and the dissenting judges recognized that the jurisdictional issue presented in this case is an "important question" of federal law that has "exceptional importance" (Pet. App. 2a, 36a).[7] Review by this Court is warranted to resolve the

---

[6] As Judge Rosenn stated in dissent in this case, "the substance of the published reprimand and the circumstances attending its declaration by the court give it all of the characteristics of an order imposing a sanction" (Pet. App. 16a).

[7] The possible availability of mandamus is not a suitable alternative to appeal. Mandamus is "a drastic remedy" to be applied only in the most egregious circumstances "amounting to a judicial usurpation of power." *In re Chambers Dev. Co.*, 148 F.3d 214, 223 (3d Cir. 1998). The standard for review in a mandamus case is far "narrower than in an ordinary appeal." *In re Sandahl*, 980 F.2d 1118, 1120 (7th Cir. 1992). As the First Circuit noted in *In re*

continuing conflict among the courts of appeals on this important and recurring jurisdictional issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
GILBERT S. ROTHENBERG
THOMAS J. CLARK
Attorneys

JANUARY 1999

Bushkin Associates, Inc., 864 F.2d 241, 245 (1989), "mandamus does not lie to control run-of-mine misuses of judicial discretion." The utility of mandamus as a remedy is further undermined by the fact that "it is within a court's discretion to refrain from issuing the writ even when the requirements for mandamus are technically satisfied." *In re Chambers Dev. Co.*, 148 F.3d at 223.